

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SHERIDA C. POWELL

APPELLANT

VERSUS

NO. 2010-CA-01041

JAMES SAMUEL POWELL

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI
CAUSE NO. 2008-0781

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR, PRESIDING

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

Sherida C. Powell - Appellant

Honorable Thomas T. Buchanan - Attorney for Appellant

Honorable John Smallwood – Attorney for Appellant

James Samuel Powell - Appellee

Honorable Terry L. Caves - Attorney for Appellee

Honorable Jerry D. Sharp – Attorney for Appellee

Honorable Franklin C. McKenzie, Jr. - Chancellor

This the 24th day of March, 2011.

Respectfully submitted,



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IV. STATEMENT OF ISSUES ON APPEAL

1. The Appellant's appeal is procedurally barred for failure to file post trial motions before the Chancellor.
2. The Chancellor was correct in his classification of marital assets.
 - A. Standard of Review
 - B. Marital residence and lot
 - C. ASAP - Future Installment Payments
 - D. Sammy's PERS Retirement Account
3. The Chancellor was correct in his division of marital property and marital debt.

V. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a divorce and an equitable division of assets and debts between James Samuel Powell (Sammy) and Sherida C. Powell (Sheri). The Court granted a divorce on the grounds of uncondoned adultery and effectuated a division of marital assets and marital debts. (CP 146, 149, 164)

B. Course of Proceedings and Disposition Below

Sammy filed an Amended Complaint for Divorce on March 12, 2009 alleging uncondoned adultery and desertion. (CP 83) A Temporary Order was entered by the Court on October 6, 2008. (CP 23) After completion of discovery, the trial of the case occurred on March 4, 2010, March 10, 2010, and March 16, 2010. The Court granted the divorce and took all other issues under advisement. (CP 146) The Court entered its Findings of Fact and Conclusions of Law on May 12, 2010 and subsequently entered a Final Judgment on May 28, 2010. (CP 149, 164)

Sheri failed to file a post trial motion giving the learned Chancellor an opportunity to review her claimed errors. Sheri filed her Notice of Appeal on June 25, 2010. (CP 166)

C. Statement of Facts

Sammy and Sheri Powell were married on February 19, 1993. (T. 7)¹ The parties separated on September 7, 2007 when Sheri left the marital domicile and moved to Laurelwood Apartments. (T. 7) Sammy's date of birth is February 21, 1948 and Sheri's date of birth is

¹ Reference to "T" are references to the pages within the transcribed testimony prepared by the Court Reporter; Reference to "CP" are references to the Clerk's Papers; Reference to "Ex." are references to Exhibits within the record; References to "R.E." are references to the Record Excerpts.

November 5, 1956. (T. 7, 20) Sheri is in good health. (T. 216) Sammy is totally disabled as a result of problems associated with his back, arthritis, left hip, and other maladies testified to by Sammy at the trial. (T. 13, 14) Sammy has a high school education and training in emergency management procedures. (T. 7-8) Sheri received a bachelor's degree in business administration from Delta State University in accounting. (T. 217) Sammy has been employed as a firefighter and worked for South Central Regional Medical Center prior to their marriage. (T. 8-11) During the marriage, he continued to work as a firefighter for the City of Laurel and formed a business called Safety-On-Site where he trained employees for industrial employers with regard to fire safety procedures. (T. 8-11)

Sheri began working for Dr. Charibeneaux, an oral surgeon. (T. 217-218) She worked at Masonite Corporation from 1981 through 1997 as an accountant in the billing department. (T. 217-218) In 1997, Sheri was given a choice of accepting a position out of state or a position in the mill department at Masonite. (T. 218-219)

The company decided to move the accounting department to Memphis, Tennessee. Sheri chose to resign and began working full-time for Sammy's limited liability company known as A Superior Ambulance Provider ("ASAP"). (T. 217-218)

Prior to their marriage, Sammy owned his home located at 27 Hummingbird Lane, Laurel, Mississippi. He owned this home approximately 37 years. (T. 6-7) Sheri had no cash assets, no land, and no inheritances at the time of the marriage. (T. 219)

Sheri did not have any savings or investments except for her retirement account with Masonite Corporation. (T. 21, 219) She did not know the value of her Masonite retirement account at the time of the marriage nor did she know the value of her retirement account at the time of the separation. (T. 220) Sheri could not testify as to the amount of her retirement that was accumulated before the marriage or during the marriage. (T. 220) The only items that Sheri

brought into the marriage were a Honda Civic automobile, her clothing, and some furniture that she had in her apartment where she lived in Ellisville, Mississippi. (T. 219)

On the other hand, Sammy brought the following items into the marriage:

1. His residence located at 27 Hummingbird Lane, Laurel, Mississippi; (T. 19, 220)
2. Furniture contained within his residence; (T. 20)
3. A fifth wheel travel trailer; (T. 20)
4. His PERS retirement account with the State of Mississippi through the City of Laurel; (T. 18) and,
5. Approximately \$43,000.00 that he had accumulated and saved through his Safety-On-Site business. (T. 20-21)

Sammy began contributing to the Public Employees Retirement System in 1985 and continued to do so continuously until he began drawing PERS disability in 2003. (T. 14, 18)

In addition, Sammy remodeled his home and signed a 15 year Note at Deposit Guaranty National Bank prior to the marriage in the approximate amount of \$59,200.00. (T. 19) Sammy opined that the value of his home at the time of marriage and prior to the remodeling was \$80,000.00. (T. 19) Sheri did not present any proof as to the value of the marital home at the time of the marriage. At the time of the marriage, Sammy paid off Sheri's car loan in full so she could pay more towards her credit card debt. (T. 20-22)

Sheri admitted that she began entering chat rooms and communicating with other men while she was married to Sammy and before leaving the marriage domicile on September 7, 2007. (T. 12-13, 209-210) Sheri continued to enter chat rooms and communicate with other men on the internet after the separation culminating in her traveling to Baton Rouge, Louisiana where she met groups of people and other men. (T. 211-212) Sheri, prior to meeting these individuals on the internet, never lived in Baton Rouge, never worked in Baton Rouge, never had

family in Baton Rouge, and never had any friends in Baton Rouge. (T. 211) She admitted traveling to Baton Rouge at least once every month on the weekends. (T. 211-212) She spent marital funds on fuel, food, and hotel rooms. During her travels she met James Niss. (T. 212) Sheri began dating Mr. Niss and had her first sexual relationship with him in May, 2008. (T. 212) This relationship culminated in many sexual encounters and adulterous activities and led to Mr. Niss moving in Sheri's apartment at Laurelwood in Laurel, Mississippi in September, 2008. (T. 212-215) Sheri admitted that she has been living in an open adulterous relationship with Mr. Niss continuously since September, 2008. (T. 212)

Sheri further testified that when she left the marital domicile on September 7, 2007, she had no intention of returning to the marriage and had no intention of reconciling. (T. 209-210) Prior to Sheri leaving Sammy, Sheri made preparations for her move by renting a storage building, applying for an apartment at Laurelwood, and paying a down payment on the deposit all with marital funds. (T. 209-210) She set up her Comcast account, Dixie Electric account, and made full preparations for leaving Sammy all without telling Sammy of her departure. (T. 209-210)

During the marriage, Sheri was solely responsible and had complete control over all three checking accounts with respect to balancing the accounts and writing checks with the exception that Sammy paid the house note. (T. 33-34, 37, 237)

In 1996, Sammy originated the idea of starting an ambulance service provider company. Sammy formed a limited liability company called A Superior Ambulance Provider ("ASAP") and was the sole member and owner of ASAP. (T. 23-43) Sheri admitted that it was Sammy's sole idea to start ASAP. (T. 219) Sheri further admitted that Sammy was solely responsible for growing the value of the company. She admitted that without Sammy, ASAP could not have started or operated. (T. 239-241)

Sheri began receiving a salary from ASAP in 1998. She deposited her salary in her Community Bank checking account. She testified that she paid some of the family bills from this account. ASAP provided her with health insurance and dental insurance, paid for her cell phone, and paid for fuel for her vehicle. (T. 231-236) The tax returns revealed the income that Sheri earned from ASAP from 2003, 2006, 2007, 2008 (Ex. 16, 25). She admitted that Sammy did not receive any compensation in the form of wages or salary from ASAP for the period 1996 through February, 2002 and from May, 2003 until the business was sold on September 27, 2006. (T. 68, 238-241)

Sammy testified that Sheri was supposed to be paid a salary as reflected on Exhibit 18 in the right hand corner. However, he testified that after performing an investigation during discovery, he realized for the first time that Sheri had been paying herself checks over and above her ASAP salary. (T. 53-58) Not only did Sheri overpay herself, she also employed her daughter, Amy Patterson, and her son-in-law and ASAP paid their wages (Ex. 18). (T. 64-65) Sammy testified that Sheri siphoned \$156,000.00 from ASAP damaging its cash flow and liquidity and ultimately resulting in a lower fair market value of the company. (T. 69, 111)

In the course of operating ASAP beginning in 1996, Sheri was responsible for overseeing the employees in the office. Sheri was further in charge of payroll, billing, accounts receivable, accounts payable, Medicare, Medicaid, private pay, and insurance reimbursement. She was responsible for payroll taxes. (T. 228, 244) She had total control of the ASAP checking accounts and was solely responsible for the payment of the ASAP bills and balancing the checkbook. (T. 237)

Sheri caused or contributed to several problems that resulted in ASAP's cash flow crisis. Medicaid audited ASAP that ultimately resulted in a \$23,000.00 liability. (T. 247-256) Sheri admitted she never told Sammy about this liability or the payments that ASAP was making on

this liability until her deposition in April, 2009. (T. 247) She was also responsible for payroll taxes and ultimately, the Internal Revenue Service filed a tax lien and froze ASAP's checking account as a result of nonpayment of payroll taxes (Ex. 10). (T. 66-68, 249) Sheri admitted that Sammy was personally liable for any Medicare and Medicaid claims that may be made after the sale and any tax claims as a result of taxes that may be owed by ASAP after the sale. (T. 255-256) (Ex. 38) Sammy testified that his liability extended for 10 years after the sale. Sheri does not have any personal liability with regard to the Medicare, Medicaid, and Internal Revenue Service issues.

Sheri refused to collect the information necessary to file the 2006 tax returns. (T 81-86) Exhibit 8 reflects federal and state tax liabilities in the sum of \$35,300.00 that were past due resulting in substantial penalties because of Sheri's negligence (Ex. 8).

In addition to monetary losses cause by Sheri, Sheri deserted the marriage resulting in approximately \$50,000.00 in out-of-pocket expenses incurred by Sammy in accountant fees, copying and duplication of documents, private investigator's fees, attorney's fees, and personal property purchased by Sammy to replace property removed by Sheri from the residence. (T. 109)

Sheri further admitted under oath that Sammy's contribution to the business would have resulted in a salary of approximately \$50,000.00 per year after taxes for the period from 1996 through the date of the sale of the business except for the February, 2002 through May, 2003 period. (T. 275)

Sammy is personally liable for the taxes owed on the cancellation of the South Mississippi Planning and Development District debt in the sum of \$32,461.00 (Ex. 38).

Sammy provided an analysis of the sale of the ASAP business that delineated the income received from the sale and all of the disbursements of the income (Ex. 8). Sheri agreed that the

analysis was accurate except for her disagreement over line 27. She disagreed with a few other notations, but did agree that the amounts were correct. She did not deny that she owed Sammy \$68,366.00 from the sale of the business. (Ex. 8, Page 2).

Out of the proceeds of the sale, Sheri received a check in the sum of \$83,755.00 that according to Sheri, was accumulated during the marriage. This money was deposited into a Metropolitan Life Insurance account (MetLife account).

Sheri admitted that she has depleted the MetLife account. (T. 261-268) An examination of the MetLife statements and her testimony reveal that between January 1, 2008 and March 31, 2008, Sheri withdrew \$17,506.39 to pay her credit card debt, purchase furniture for her Laurelwood apartment and to pay her medical expenses. Because she withdrew the money from this retirement account, she had to pay withdrawal charges and taxes (Ex. 12). Between April 1, 2008 through June 30, 2008, Sheri admitted withdrawing \$18,237.73 which she used to pay her taxes and to pay \$1,000.00 taxes on the 116 Mason Street property (Ex. 12) (T. 261-268).

Between July 1, 2008 through September 30, 2008, Sheri withdrew \$8,152.17 and used this money to pay her attorney \$5,500.00 together with withdrawal charges and taxes and she has retained \$2,000.00 of that money which she claims she will owe to her attorney. (T. 261-268)

Exhibit 12 indicates that as of September 30, 2007 which is the date of the separation or right after the separation, the MetLife account contained \$141,180.80 (Ex. 12, Page 8). This MetLife account was in complete control of Sheri during this period of time. (T. 261-268)

This Court entered its Temporary Order on October 6, 2008. Subsequent to the entry of the Temporary Order and after being prohibited from transferring marital assets, Sheri withdrew a total of \$7,800.00 from the MetLife account for her personal use. (T. 266-268)

VI. SUMMARY OF THE ARGUMENT

Sheri is procedurally barred from appealing this case due to her failure to file post trial motions before the Chancellor. As in cases decided in Circuit Court with a jury, the parties are required to file post trial motions in Chancery Court in order to preserve error on appeal. *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017 (Miss. 2007), *Ory v. Ory*, 936 So.2d 405 (Miss. Ct. App. 2006) and *Adoption of Minor Child*, 931 So.2d 566 (Miss. 2006) Because Sheri did not file a post trial motion following the entry of the Final Judgment, she is barred from pursuing this appeal.

Sheri is also prohibited from raising as error the Court's valuation of the marital assets. Sheri failed to raise the Chancellor's claimed error in her Statement of Issues. *Reed v. State*, 987 So.2d 1054 (Miss. Ct. App. 2008)

The Chancellor's valuation of the marital estate was supported by competent evidentiary proof. The Chancellor is the sole judge of the credibility of the witnesses and this case turned on the witness' veracity. The parties are responsible for presenting proof including valuation. *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss. Ct. App. 1999) An owner of real property is competent to give an opinion on the value of his property. *Dunn v. Dunn*, 911 So.2d 591 (Miss. Ct. App. 2005) Therefore, the Court's valuation of the marital residence was supported by Sammy's opinion and the opinion of an appraiser. The Court's value of the ASAP note receivable in the amount of \$191,522.10 plus 8.237% interest was supported by substantial evidence. The Chancellor's value of the note receivable weighed in Sheri's favor because the Chancellor did not reduce the note receivable to net present value.

Sammy's PERS disability payment was determined by the Chancellor to be a marital asset. However, the Chancellor considered the entire marital estate and not just one asset in isolation in making his equitable division of the marital estate. The Chancellor is prohibited

from viewing a marital asset in isolation. The Chancellor is required to view all marital assets and debts to effectuate an equitable division. *James v. James*, 736 So. 2d 492 (Miss. Ct. App. 1999)

The Chancellor was correct in his division of marital property and marital debt. As will be shown in this Brief, Sheri Powell received more than 50% of all of the marital assets. The Court considered not only the parties' economic contributions, but also Sheri's waste of substantial marital assets, destruction of the value of ASAP, and her immoral lifestyle and fault in destroying the marriage.

VII. LEGAL ARGUMENT

- 1. The Appellant's appeal is procedurally barred for failure to file post trial motions before the Chancellor.**

The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal. *Purvis v. Barnes*, 791 So.2d 199 (Miss. 2001) *Chassaniol v. Bank of Kilmichael*, 626 So.2d 127, 133 – 134 (Miss. 1993)

In *Barnes v. Singing River Hosp. Sys.*, 733 So.2d 199, 202 (Miss. 1999), (quoting *Educational Placement Servs. v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986)), the Court stated:

“We accept without hesitation the ordinarily sound principal that this Court sits to review actions of trial court and that we should undertake consideration of no matter which is not first been presented to and decided by the trial court. We depart from this premise only in unusual circumstances.”

This Court has repeatedly held that a trial judge will not be found in error on a matter not presented to the trial court for a decision. *Bender v. North Meridian Mobile Home Park*, 627 So.2d 385, 389 (Miss. 1994) Logically, the only way to present an error regarding a question

such as this would be by way of a motion for a new trial. *Purvis v. Barnes*, 791 So.2d 199 (Miss. 2001)

In *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017 (Miss. 2007), the Supreme Court once again held:

“A trial judge will not be found in error on a matter not presented to the trial court for decision.”

The proper method to address any concerns about evidence would have been through a motion for a new trial pursuant to M.R.C.P. 59, which provides that a Chancellor or other trial court sitting without a jury may open a judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.

Our Courts have repeatedly upheld this procedural principle of law that in order to preserve an error of a Chancellor on appeal, the party must file a post trial motion, bringing this error to the Court’s attention so that the Chancellor would have the opportunity to review and reconsider his decision. *Ory v. Ory*, 936 So.2d 405 (Miss. Ct. App. 2006), *Adoption of Minor Child*, 931 So.2d 566 (Miss. 2006)

As recent as January 25, 2011, the Court of Appeals held in *Robinson v. Brown* (2009-CA-01599-COA) that failure to assert alleged errors post trial to the Chancellor waives the parties’ right to complain of the error on appeal. The Court cited to Mississippi Rule of Civil Procedure 52 which allows a Court to amend its findings or make additional findings, upon motion of a party filed not later than ten (10) days after the entry of a judgment or entry of findings and conclusions of law. *Watts v. State*, 492 So.2d 1281, 1291 (Miss. 1986) (Appellant was procedurally barred from raising an issue on appeal where he failed to raise it in his post trial motion.

This case was tried on March 4, 10, and 16, 2010. A Judgment of Divorce was entered on March 18, 2010 granting James Samuel Powell a divorce on the grounds of uncondoned adultery and taking under advisement all other issues.²

On May 12, 2010, the Chancellor entered his Findings of Fact and Conclusions of Law resolving all remaining issues which was followed by a Final Judgment that was entered on May 28, 2010.

Instead of filing a post trial motion for the Court to reconsider his findings and conclusions of law, Sheri filed a Notice of Appeal on June 25, 2010. Because Sheri failed to timely file a post trial motion provided by Mississippi Rules of Civil Procedure, she has waived her assignment of errors on appeal in this case.

Sheri's errors can be summarized as follows:

1. The Chancellor erred in his valuation of the marital residence and lot;
2. The Chancellor erred in valuation of the note receivable from the sale of ASAP, a marital asset;
3. The trial court erred in not dividing Sammy's PERS retirement; and,
4. The Chancellor erred in his division of marital assets.

In fairness to all Chancellors of this State, the parties should give the Chancellor an opportunity to correct his or her alleged errors before filing a notice of appeal. Since the Chancellors are obligated by the rules of this Court to make findings of fact on issues concerning custody, equitable distribution, alimony, and child support among others, those same Chancellors should be given the opportunity once they make those findings of fact to reconsider, clarify, reopen the evidence, take additional testimony, and enter new findings to correct any errors.

²This Judgment was clearly interlocutory and not ripe for appeal.

However, in this case, no such opportunity was given to the Chancellor. As will be shown in this Brief, the Chancellor was not in error in any of his findings or application of the law.

Sheri has also waived her right to claim any perceived errors by the Chancellor because her argument was not raised in the statement of issues. M.R.A.P. 28 The appellate rules of the Supreme Court require that an appellant set forth a statement of issues. M.R.A.P. 28(a)(3)

“Statement of Issues. A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement. No statement distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.”

This Court has refused to consider issues raised in the Appellant’s Brief without including those issues in the Statement of Issues. *Giles v. Stokes*, 988 So.2d 926 (Miss. Ct. App. 2008) In *Reed v. State*, 987 So.2d 1054 (Miss. Ct. App. 2008), the Court held that Reed failed to specifically identify his assignments of error on issues 1, 2, and 4 as listed in paragraph 7 and is barred from attempting to address them in the substantive argument section of his brief. *Reed* at 1057.

Facts asserted to exist must and ought to be definitely proved and placed before us for a record, certified by law; otherwise, we cannot know them. *Creel v. Cornacchione*, 831 So.2d 1179 (Miss. Ct. App. 2002) citing *Mason v. State*, 440 So.2d 318, 319 (Miss. 1983) Although Sheri filed a statement of issues and complained that the Court erred in the ownership and classification of marital assets, the entire substantive argument addresses the Chancellor’s error in his valuation of marital assets. One sentence on page 12 of the Appellant’s Brief claims the Chancellor erred in failing to find that Sammy’s PERS was a marital asset. This is not correct. There was no dispute that a portion of Sammy’s PERS was contributed to during the marriage. The Chancellor took this marital asset into consideration in making an equitable division of this

entire marital estate. Because Sheri did not raise the Chancellor's alleged valuation errors in her statement of issues, this Court should not entertain her argument concerning same.

2. The Chancellor was correct in his classification of marital assets.

A. Standard of Review

In reviewing questions of fact, the Appellate Court will not disturb a Chancellor's findings so long as those findings are supported by substantial evidence and are not manifestly wrong, clearly erroneous, or the product of misapplication of the law. *Murray v. McRae*, 741 So.2d 1009 (Miss. Ct. App. 1999) Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relation matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record. *Henderson v. Henderson*, 757 So.2d 285, 289 (Miss. 2000) For a review of the findings of a trial judge sitting without a jury, this Court will reverse only where the findings of a trial judge are manifestly erroneous or clearly wrong. A judge sitting without a jury has sole authority for determining the credibility of the witnesses. *Rice Researchers v. Hiter*, 512 So.2d 1259, 1265 (Miss. 1987) The Chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. *Howard v. Fulcher*, 806 So.2d 328, 332 (Miss. Ct. App. 2002) "It is necessarily the case that, when conflicting testimony on the same issue is presented, the Chancellor sitting as a trier of fact, must determine which version he finds more credible." *id* The evidence and credibility of a witness is the sole responsibility of the Chancellor as well as the weight of the evidence. *Lee v. Lee*, 798 So.2d 1284, 1288 (Miss. 2001)

This Court will not undermine the Chancellor's authority by replacing his judgment with their own. *Madden v. Rhodes*, 626 So.2d 608, 616 (Miss. 1993) This Court does not reevaluate

the evidence, retest the credibility of witnesses or otherwise act as a second fact finder. If there is substantial evidence in the record to support fact findings, no matter what contrary evidence there may also be, we will uphold the Chancellor. *Smith v. Jones*, 654 So.2d 480, 485 (Miss. 1995)

This case involves questions of fact and the Chancellor's decisions turned on his credibility determinations made during the course of this trial. The "manifest error" standard is the proper standard for this court to review the claimed errors of the Chancellor.

According to this Court's ruling in *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994), the first step before division of the assets is for the Chancellor to characterize the parties' assets as marital or non-marital. The Chancellor must also determine the ending date for the accumulation of marital property. Our Supreme Court has held that the entry of a temporary order ends marital property accumulation as a matter of law. *Godwin v. Godwin*, 758 So.2d 384, 386 (Miss. 1999) Next, the Chancellor must determine a valuation date for purposes of valuing all marital assets. Our Court has stated that "when equitably dividing marital property upon a divorce, the date of valuation is necessarily within the discretion of the Chancellor." *Holdeman v. Holdeman*, 34 So.3d 650 (Miss. Ct. App. 2010), *Heigle v. Heigle*, 771 So.2d 341 (Miss. 2000)

After determining a valuation date, the Chancellor is required to value all of the marital assets and determine the amount of marital debt. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) The marital assets of the parties are measured by their fair market value. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), *Drumright v. Drumright*, 812 So.2d 1021 (Miss. Ct. App. 2001)

In determining the classification of the assets as marital or non-marital, in *Hemsley v. Hemsley*, 639 So.2d 909, 914-915 (Miss. 1994) the Supreme Court held:

“We define marital property for the purpose of divorce being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the Chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise, are of equal value.”

However, separate property can be converted to marital property by commingling or family use.

Stewart v. Stewart, 864 So.2d 934, 938-939 (Miss. 2003) The law requires consideration of the following factors, or a finding of inapplicability by the Chancellor:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
 - a. Direct or indirect economic contribution to the acquisition of the property;
 - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage;
 - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of the assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or *inter vivos* gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distributions;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,

8. Any other factor which in equity should be considered. *Ferguson*, 639 So.2d at 928.

An equitable division of property does not necessarily mean an equal division of property. *Chamblee v. Chamblee*, 637 So.2d 850, 863-64 (Miss. 1994) Fairness is a prevailing guideline in marital division. The polestar consideration in equitable division is fairness. *McDuffie v. McDuffie*, 21 So.3d 685 (Miss. Ct. App. 2009)

These rules are familiar and have been established through case law since 1994. Although Sheri identifies the issue as the Chancery Court erring in determining the ownership and classification of marital assets, she makes the following statement in the case:

Sheri agrees that the marital assets and debts identified by the trial court are properly classified as marital assets and debts.” (Page 12, Appellant’s Brief)

The only classification error pointed out by Sheri in the substantive argument portion of her Brief states “furthermore, the trial court did commit error in failing to find that Sammy’s PERS was a marital asset.” (Page 12, Appellant’s Brief)

As previously argued, Sheri waived her right to argue that the Chancellor erred in his valuation because valuation was not assigned as an issue for this Court to consider and no post trial motion was filed. Even so, Sammy will address Sheri’s error with regard to valuation and PERS.

This Court has held that the Chancellors of this State are not responsible for the evidence that is presented at trial. As the Court of Appeals has said, “it is incumbent upon the parties, and not the Chancellor, to prepare evidence, touching on matters pertinent to the issues to be tried.” *Dunaway v. Dunaway*, 749 So.2d 1112, 1118 (Miss. Ct. App. 1999) Where a party fails to

provide information, the Chancellor is entitled to proceed on the best information available. *id.* Where a party fails to provide accurate information, or cooperate in the valuation of the assets, the Chancellor is entitled to proceed on the best information available. *Dunaway v. Dunaway*, 749 So.2d 1112, 1114, 1128 (Miss. Ct. App. 1999) Where parties provide inadequate proof of an assets value, a Chancellor's valuation with "some evidentiary support" will be upheld. *Dunn v. Dunn*, 911 So.2d 591 (Miss. Ct. App. 2005) "It is incumbent upon the parties, and not the Chancellor to prepare evidence touching on matters pertinent to the issues to be tried." *Dunaway* 749 So.2d at 1118.

The question before this Court is whether the Chancellor's valuation was based on substantial evidence. This Court has previously held that a party may testify and give an opinion as to the values of his property. *Dunn v. Dunn*, 911 So.2d 591 (Miss. Ct. App. 2005)

In addition, this Court's rulings in eminent domain cases are instructive. "It is settled in eminent domain practice that a landowner may give his opinion of the fair market value of his property." *Potters II v. State Hwy. Comm'n of Miss.*, 608 So.2d 1227, 1235 (Miss. 1992), *Clark v. Miss. Transp. Com'n*, 767 So.2d 173 (Miss. 2000)

In fact, a landowner is exempt from showing that he possesses the qualifications necessary and allowed to be accepted as an expert witness. This rest on the premise "that the landowner through his ownership has acquired a unique view of the property and that he can and ought to be allowed to share this view with the jury." *Potters II*, 608 So.2d at 1235.

B. Marital residence and lot

In this case, Sammy Powell owned his home for 37 years. He owned his home 20 years before marrying Sheri. He remodeled his home and made numerous repairs through the years. He borrowed money on his home. Sammy is eminently qualified to give an opinion of the value of his home as of the date of his marriage to Sheri. Sheri argues that Sammy provided no

documentary evidence to support his opinion and that Sammy could have presented additional proof. However, Sheri is under the mistaken impression that Sammy is solely responsible to present the value of all property of the marriage. Sheri is equally responsible to present competent proof of the value of the marital property. Sheri gave no opinion as to the value of the homestead property. Therefore, the Chancellor who was the sole judge of the credibility of the witnesses, accepted Sammy's value as credible in this case. Sheri could have presented tax records, obtained an appraisal of the value in 1993, and provided the original Deed of Trust, but she chose not to. This was Sheri's responsibility. *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss. Ct. App. 1999)

The Chancellor's decision to accept the value of the marital property at \$80,000.00 at the time of the marriage is supported by substantial evidence and our case law. *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss. Ct. App. 1999)

Sheri seems to complain that the Chancellor did not consider the entire value of the \$123,200.00 in making his equitable division. This is incorrect. In fact, Sammy agreed that the marital residence was a marital asset due to family use. The Chancellor did include the full value of the marital residence in making a determination of his equitable division of the entire marital estate. (CP 161) Sheri wants this Court to view the house in isolation instead of considering the entire assets. *James v. James*, 736 So. 2d 492 (Miss. Ct. App. 1999)

C. ASAP - Future Installment Payments

Sheri once again admits that the trial court correctly determined that the future installments (note receivable) from the sale of ASAP was a marital asset. (T 157) Although Sheri did not raise the Chancellor's valuation of this asset as error in her Statement of Issues, the Chancellor was correct in accepting the valuation of the ASAP note at \$191,526.10 plus 8.237% interest. *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017 (Miss. 2007) What Sheri seems to be

complaining about, is that the Court did not reduce the note receivable to present value. The figure that the Chancellor used was in Sheri's favor and not Sammy's. Had Sheri wanted to produce proof of the net present value of the note receivable, she could have employed an expert to do so. It is not the responsibility of the Chancellor to present net present values or other proof. It is the responsibility of the parties. *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss. Ct. App. 1999) Although Sheri failed to present net present value of the note receivable, the gross amount used by the Chancellor weighed heavily in her favor. (CP 6)

Sheri also takes this asset in isolation to contend that the Chancellor erred in his equitable division. The Chancellor's decision concerning marital asset division cannot be reviewed by looking at each individual asset in isolation. The Court should review the entire marital estate including assets and debts to determine if the Chancellor's decision was fair. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994)

The proper disposition of the ASAP future installments, Sammy's PERS retirement account, and the marital residence must be considered in light of all marital assets available for distribution and debt in the lower court's actual distribution of those assets. Each individual asset cannot be isolated from the rest of the marital assets as though it were placed in a vacuum. *James v. James*, 736 So.2d 492 (Miss. Ct. App. 1999) The Appellate Court is charged with determining whether the entire property division was equitable, not whether each marital asset was equitably divided; therefore, the Chancellor's decision regarding the division of marital property shall be viewed as a whole in determining whether he abused his discretion. *Wideman v. Wideman*, 909 So.2d 140 (Miss. Ct. App. 2005) In the final analysis, all awards should be considered together to determine if they are equitable and fair. *Ferguson*, 639 So.2d at 929. *Ferguson* governs a process which Chancellor's should consider when making an equitable distribution of marital property in Mississippi. In addition, *Ferguson* asserts an automatic right

to equal division of jointly accumulated property does not exist, but rather, division is left to the discretion of the Chancellor. *Ferguson*, 639 So.2d at 927 In view of the entire marital estate, the Chancellor was correct in his division of the ASAP note receivable asset.

D. Sammy's PERS Retirement Account

Sammy Powell was determined by PERS and the Social Security Administration to be totally disabled in 2003. (T. 14) Upon Sammy's disability, he applied and received PERS disability payments. (T 124) PERS is not divisible with a QDRO. (T 125)

Sheri was awarded the Met Life Retirement Account in the amount of \$61,672.29. A majority of this amount was created from the sale of ASAP. The Chancellor weighed the fact that Sammy was totally disabled and receiving a monthly disability from PERS with the award of 100% of the Met Life account to Sheri.

Sheri had equal access to produce the information with regard to Sammy's retirement by way of a request for production or subpoena. Sheri chose not to subpoena any PERS records and therefore, the Court was only obligated to consider the evidence that was presented before him. *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss. Ct. App. 1999), *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994) The Chancellor's decision with regard to the PERS retirement was correct.

3. The Chancellor was correct in his division of marital property and marital debt.

According to this Court's ruling in *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994), the first step for a division of assets is for the Chancellor to characterize the parties' assets as marital or non-marital. The Chancellor must determine the ending date for accumulation of marital property and determine the date for division. *Godwin v. Godwin*, 758 So.2d 384, 386 (Miss. 1999) The Chancellor must value all of the marital assets and marital debt and then

conduct an equitable division of those assets and debts according to *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) Sheri does not complain about the classification or the valuation date of the Powell's marital assets and marital debts. Her argument focuses on the unfairness of the Chancellor's division of the marital estate.

An equitable division of property does not necessarily mean an equal division of property. *Chamblee v. Chamblee*, 637 So.2d 850, 863-864 (Miss. 1994) Fairness is the prevailing guideline in marital division. The polestar consideration in equitable division is fairness. *McDuffie v. McDuffie*, 21 So.3d 685 (Miss. Ct. App. 2009) Sheri's statement that Sammy received 75% of the marital assets and Sheri received 25% of the marital assets is absolutely incorrect. The parties received the following assets and debts as a result of the Chancellor's division of this marital estate:

Sheri Powell

Checking Account - \$1,338.96
(Exhibit 4)

ASAP Proceeds and appreciation in Met Life –
\$141,180.00 received by Sheri
Powell (Exhibit 12; T. 95)

Mason Street Rent Proceeds already received
\$14,400.00

One-Half Mason Street Property - \$39,250.00

Household and Personal Property - \$89,038.95
(Exhibit 6; T. 107)

\$156,000.00 Received by Sheri through ASAP
Overpayments (T. 111)

Honda Accord Vehicle - \$7,000.00
(Exhibit 3)

Eclipse Vehicle - \$18,930.00
(Exhibit 3)

Sammy Powell

Checking Account - \$4,397.49
(Exhibit 3)

Marital Home and Lot
\$123,200.00 (Exhibit 3)

ASAP sell installments already
received - \$98,473.90

One-Half Mason Street Property
\$39,250.00

Household and Personal Property
\$18,600.00 (Exhibit 3)

All future ASAP installments
\$191,526.10

Truck vehicle - \$2,500.00

Truck vehicle - \$5,000.00

TOTAL ASSETS - \$482,947.49

TOTAL ASSETS - \$467,137.91

Less Debt - \$15,872.00
(vehicle note)
(Exhibit 3)

Credit Card - \$2,943.77
(Exhibit 3)

NET ASSETS - 448,322.14

Tax Liability for SMPDD
32,461.00

Less Credit Card Debt - \$7,799.64

NET ASSETS - 442,686.85

The total net marital estate was valued at \$891,008.99. Sheri Powell received approximately 50.3% of the marital estate. Sammy received approximately 49.7% of the marital estate.

In reviewing the Ferguson factors, the learned Chancellor made a fair division of the parties' marital estate.

Direct or indirect economic contribution to the acquisition of the property

In 1996, Sammy originated the idea of starting an ambulance service provider company. (T. 23-43) Sammy formed ASAP and was the sole member and owner. (T. 23-43) Sheri admitted that Sammy created the idea of ASAP and was responsible for growing the value of the company. (T. 239-241) Sheri began working for ASAP in 1998 and drew a salary. Most of her salary was not taxed because ASAP incurred losses during the operation of the company. (Ex. 16, 25) (T. 59) Sheri admitted that Sammy did not receive any compensation in the form of wages or salary from ASAP from 1996 to February 2002 and from May, 2003 until the business was sold on September 27, 2006. (T. 68, 238-241) Sheri admitted that Sammy's work would have been equivalent to \$50,000.00 a year. (T 275) Sammy's efforts for the nine years with ASAP was worth at least \$450,000.00. *Woolridge v. Woolridge*, 856 So.2d 446 (Miss. Ct. App. 2003) (Spouse working without compensation is an economic contribution to the joint accumulation of marital property).

Although Sheri worked as an employee for the company, she damaged the value of the business. Sheri siphoned off \$156,000.00 during her tenure as bookkeeper. (T 69, 111) Sheri failed to pay payroll taxes and the IRS froze the company bank account. Sheri's failure to pay these payroll taxes cost the company \$25,000.00. (T 44 – 48) Her negligence resulted in the IRS freezing the company's account and filing a lien. Sammy's post separation investigation of payroll records revealed that Sheri overpaid herself without Sammy's consent. (T 53 – 58) Her overpayments resulted in a cash flow shortage to the company of \$50,393.00. (T 55 – 58; Exhibit 18) Sheri wrote checks payable to Sammy but she endorsed his name and deposited the checks in The First Bank in the amount of \$62,798.00. (Ex. 9; T. 64) All of this was done without Sammy's knowledge or consent. Her actions adversely impacted the company's cash flow. Sheri wrote a total of \$62,798.00. (T 64; Exhibit 9) Sheri also made advances to her daughter and cooked the books. (T 65 - 66) She also concealed her improper handling of Medicaid payments. Her negligence cost the company \$25,000.00. She concealed this problem from Sammy. (T 46 – 48) Sheri failed to pay a majority of the 2007 and 2008 taxes because of her failure to do her job. (T 86 – 88)

Although a Temporary Order was entered by this Court on October 6, 2008 prohibiting the parties from transferring assets, Sheri withdrew a total of \$7,000.00 from the Met Life account in violation of the Court's order. (T 90 – 101) *Jones v. Jones*, 904 So.2d 1143 (Miss. Ct. App. 2004) (Wife's withdrawal of retirement account funds in violation of Temporary Order constituted waste). Sheri cost Sammy approximately \$50,000.00 in expenses as a result of her abandoning the marriage. (T 109) The Chancellor properly considered the wife's withdrawal of funds from the joint checking account incident to divorce. *Rodriguez v. Rodriguez*, 2 So.3d 720 (Miss. Ct. app. 2009) After the sale of ASAP, the company continued to operate its bookkeeping and payroll services in Sammy's home. ASAP employees trashed and damaged his house which

resulted in a repair cost of approximately \$20,000.00. (T 116) The Chancellor took into consideration Sheri's waste and damage to the company resulting in a lower fair market value upon the sale.

The contribution to the stability and harmony to the marital family relationship as measured by quality, quantity of time spent on family, duties, and duration of marriage.

Sheri Powell was at fault for destroying the marriage. Sheri left the marriage on September 7, 2007. Prior to leaving and without informing Sammy, she incurred expenses in renting a storage building, making a deposit on an apartment, and purchasing furniture. (T. 209-210) All of these expenses were paid with marital funds. Sheri admitted to committing adultery. (T. 212-213) Although she contended that her adultery occurred after the separation, she regularly visited chat rooms with other men which began as early as 2000. (T 209 – 2010) It is doubtful that her rendezvous with men only occurred after the separation. Soon after the separation, she moved her boyfriend, James Niss, in her apartment and they continued to live together through the trial of the case. (T. 212-213) While Sheri was living in open adultery with her lover, they shared all expenses and traveled extensively. Sheri used the parties' marital retirement account with Met Life to help support her adulterous activity. (T 212 – 213; 232 – 233)

Sheri was clearly at fault in destroying the marriage. Marital fault is a factor in equitable distribution. *Carrow v. Carrow*, 642 So.2d 901 9Miss. 1994) She gave no testimony that Sammy did anything that would constitute a ground for divorce.

The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.

In addition to Sheri's activities contributing greatly to the devaluation of the company and the adverse effect on its cash flow, Sheri squandered approximately \$51,000.00 from the

parties' Met Life retirement account. (T. 95-101) The Metropolitan Life Insurance account was valued at \$141,180.08 on September 30, 2007. (T 93 – 101; Ex. 12) Sheri withdrew approximately \$51,000.00 including penalties from the Met Life account. Most of these withdrawals were used to support her immoral lifestyle with Mr. Niss. *Rodriguez v. Rodriguez*, 2 So.3d 720 (Miss. Ct. App. 2009) The Chancellor's award took into consideration not only the contributions of the parties but also Sheri's immoral life style and destruction of the marriage, her dissipation of marital assets and her contributions to the diminished value of the company. Her willful violation of the Temporary Order is not acceptable. (T. 98)

Based on the facts and the guidelines in *Ferguson* and *Hemsley*, the Chancellor's division of assets and debts was fair and equitable.

VIII. CONCLUSION

This Court should dismiss Sheri's appeal for failure to file post trial motions which would have given the Chancellor an opportunity to correct any claimed errors. Sheri Powell received more than 50% of the marital estate. She did not pursue a claim for alimony. Therefore, the Chancellor's division of the marital estate and debt was fair and an award of more than 50% of the marital assets to Sheri supports the Chancellor's correct decision.

Respectfully Submitted,

JAMES SAMUEL POWELL

BY:


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IX. CERTIFICATE OF SERVICE

I, Terry L. Caves, Attorney for James Samuel Powell, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Brief of Appellee to:

Thomas T. Buchanan, Esquire
John Smallwood, Esquire
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Honorable Franklin C. McKenzie, Jr.
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This the 24th day of March, 2011.


TERRY L. CAVES